No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, et al, Minors, by Guardian ad Litem,
Appellants,

vs.

H. FOCKE, et al,
Appellees.

Brief of Counsel for Trustees

Upon Appeal from the Supreme Court for the Territory of Hawaii.

WILLIAM L. STANLEY,
Attorney for Trustees—Appellees.

Filed this ..... day of May, 1923.
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

HONOLULU STAR-BULLETIN, LTD.

INDEX

	Pages
Statement of Case	2
The Facts and Authorities as to Admissibility of Extrinsic Evidence	2-9
Error in Appellants' Brief	9
The Will	10-12
Rule in Howe v. Dartmouth	12-16
Propositions Precluding Application of Rule:	16-35
A. No conversion required where specific directions as to disposition of income	17-25
Use of word "rents" strong indication, where there is no freehold, that leaseholds are to be enjoyed in species.	
B. Where no trust for conversion, power to retain investments sufficient to exclude rule in Howe v. Dartmouth	26-31
C. No conversion required where there is no trust for conversion and there is a discretionary power of sale	31-33
D. Immaterial whether legacy or bequest is specific or not	34
E. No equitable conversion arises where trustee is given mere authority to convert without the imperative duty of doing so	34-35
Cases in which Howe v. Dartmouth Rule Applied	35-36
Conclusion	36-37

No. 3989

United States
Circuit Court of Appeals
For the Ninth Circuit.

EVA GAY, a Minor, BEATRICE GAY, a Minor, SONNY JAMES MOKULEIA GAY, a Minor, MICHAEL VANATTA K. GAY, a Minor, LLEWELLYN NAPELA GAY, a Minor, ALBERT GAY HARRIS, a Minor, WALTER WILLIAM HOLT, a Minor, ALICE K. HOLT, a Minor, and ETHEL FRIDA HOLT, a Minor, by HARRY EDMONDSON, Their Guardian ad Litem,

Appellants,

vs.

H. FOCKE and H. M. von Holt, Trustees Under the Will of the Estate of JAMES GAY, Deceased, and LLEWELLYN NAPELA GAY, REGINALD ERIC GAY, ARTHUR FRANCIS GAY, ALICE MARY K. RICHARDSON, HELEN FANNY GAY and FRIDA GAY,

Appellees.

BRIEF OF COUNSEL FOR TRUSTEES

STATEMENT OF CASE

The Trustees, Appellees in the above cause, as Trustees under the will of James Gay, late of Waialua, deceased, filed their bill in Equity in this cause joining as parties respondent the children (hereinafter called the life-tenants) and the grandchildren (hereinafter called the remaindermen) of the said James Gay, praying for a construction of his last will and testament and asking the court for instructions as to their duties under the said will, and the cause comes to this court on the appeal of the remaindermen from a decree of the Supreme Court of the Territory of Hawaii, entered on the 8th day of March, 1922.

As will be shown later the construction to be placed upon the will depends largely upon the question whether the will does or does not fall within a rule of construction of ancient authority in the English courts and known as the "rule in Howe vs. The Earl of Dartmouth". Very few authorities on the application of this rule are to be found in the American reports and, as in the courts below neither counsel for the life-tenants nor for the remaindermen went at any great length into a review of the numerous English authorities, counsel for the Trustees has deemed it to be his duty to examine those authorities and to present this brief thereon with the sole purpose of assisting the court in arriving at a correct construction of the will.

THE FACTS.

Counsel for the life-tenants and remaindermen have

substantially presented in their briefs all of the facts disclosed in the Statement of Evidence (Record 120-147), and it is unnecessary to repeat them at length here. Those facts include:—

The circumstances surrounding the testator at the time of making his will (May 25, 1893) and at the time of his death (three days later), the then condition of his estate and the amount and character of his property, the condition of his family and his relationship to the objects of his testamentary disposition.

The testator left surviving him his widow and seven children, the youngest at the time of his death being three or four years old and the eldest about sixteen.

He owned no real estate—a fact, as the authorities later cited herein show, of great importance in this case.

The principal assets of the estate consisted of (1) household furniture, farm implements, etc. (2) several hundred head of cattle and horses (3) a leasehold at Mokuleia, having an unexpired term of some forty years (4) a contract (hereinafter referred to as the Ookala lease) with the Ookala Sugar Company under which the estate was entitled for a term of some seven years to a percentage of the sugar grown and manufactured by that company on lands held by the testator under a lease from the Crown Land Commissioners. All of the above assets are what is known in law as *perishable* or *wasting* assets.

Of these assets items (1) and (2) were combined by the testator with a portion of the land at Mokuleia (Item 3) as the basis of his business as a rancher and

stock raiser, and other portions of Item (3) were sublet by him to others for the cultivation of rice, etc. The gross subrentals derived from the Mokuleia lease were $2,723.50, out of which was payable a head rent of $1,250. The net rent from the Ookala lease in the year preceding the testator's death was about $600.

To the effect that testimony of the above kind should be considered on the construction of a will when the language is not plain or the meaning obvious, see:—

Blake v. Hawkins, 98 U. S. 315;
Chambers Est. 183 N.Y.S. 526;
In re Kellerman's Will, 11 N.Y.S. 139;
Herring v. Williams, 69 S.E. 140;
Macey v. Oshkosh, 128 N.W. 899.

In McCorn v. McCorn, (N.Y.) 3 N.E. 480, parol evidence was permitted that a testator had no personal estate out of which legacies could be satisfied, in order to show an intention that they should be charged upon the realty, the court saying (pp. 480, 481):

"The will was made one day before his (testator's) death so no change in the condition of his estate can be supposed as occurring in the interval. The testator must have known that he had no personal estate . . . The situation is such that all possibility of innocent mistake is removed, and the facts drive us to the alternative of believing that the testator, in making his will under the solemnity of approaching death, indulged in bequests known to be useless and vain, or meant that they should be paid from the only possible source. No reasonable intelligence can hesitate to draw the latter inference."

See also Turner v. Gibb, et al (N.J.) 22 Atl. 580, 581;

"The fact that the testator *must have known* that the personal estate was not sufficient to pay all the legacies is to be considered in ascertaining his intention to charge them on the land, and raises a strong presumption that such was his purpose."

See also Briggs v. Carroll, 22 N.E. 1054, 1055:

"We are very far from saying that a residuary clause, blending in its form of disposition both real and personal estate will produce a charge upon the former for the payment of legacies wherever the personal estate proves insufficient. No such doctrine can be justified. *The deficiency must exist when the will is executed* and be so great and so obvious as to preclude any possible inference that the testator did not realize it, or that he may have expected and intended before his death to remove the difficulty." Parol evidence was admitted to show the existence of this deficiency.

In the appellants' brief (p. 16) it is argued that extransic evidence was not admissible in the present case because, "here, until the property of the deceased was known, no question could have arisen" and that "the words of a will, the meaning of which is clear, cannot be changed nor can such meaning be altered by knowing what the property consists of." In the cases McCorn v. McCorn, Turner v. Gibb, and Briggs v. Carroll, supra, no question could have arisen until the deficiency of personalty was known, and yet parol evidence was held admissible to show the existence of the deficiency as a result of which the questions arose. In this case the lack of realty is one of the factors

ner on Wills, 388, 389; Page on Wills, 988; Schouler on Wills, 581; Jarmon on Wills, vol 1 (6th Ed.) 400-402; Meyers vs. Maverick, 28 S. W. 716." . . . .

"It is also said that while the intent 'must be ascertained from the meaning of the words in the instrument and from those words 'alone', yet, as the testator 'may be supposed to have used language with reference to the situation in which he was placed, to the state of his family, his property, and other circumstances relating to himself individually and to his affairs, the law admits extrinsic evidence of those facts and circumstances, to enable the court to discover the meaning attached by the testator to the words used in the will, and to apply them to the facts of the particular case.' " . . .

"It is of course elementary that all parts of the instrument must be construed together, and the intention of the testator be arrived at by considering the whole, and not from detached, segregated, and isolated words, sentences, or clauses."

The Statement of Evidence also contains facts showing the conduct and management of the estate by the trustees, and a partial statement of their receipts and disbursements from the date of the reception of the trust to the filing of their bill for instructions. This shows that the income has, owing to circumstances which could not possibly have been foreseen by the testator, (e.g. that his ranch would become the site of a vast sugar estate), grown to very large proportions compared with that which the testator's property produced in his life time. Great stress is laid by the appellants upon the large income of the estate, whereas the fact of this increase *subsequent to the testator's*

death can have no bearing on the construction to be placed upon his will. Such evidence was, and could only be, introduced with a view to the statement of an account in case it were decided that the Trustees were not justified in distributing, as they have done, all of the income received by them to the life tenants. On the question of the construction of the will the only extrinsic facts which can be considered are those which in the nature of things could have been presented if the present bill had been brought when the trustees first assumed their duties, viz.: circumstances surrounding the testator at the time of making the will and at the time of his death. The general rule is that a will must be interpreted as far as possible from the standpoint of the testator, and it must be obvious that events not anticipated by him can throw no light on what his intentions were, or on the question as to how his will should be construed.

One allusion,—in fact a flat statement,—is made in appellants' brief, that is not correct. On page 11 occurs the expression "less certain counsel fees allowed in this proceeding which have been paid out of corpus". The order of the court as to counsel fees is not in the record. We can only meet the statement by going outside of the record, as appellants have done in making it, and say that the order apportioned counsel fees between corpus and income in the same proportion as the rents were apportioned.

THE WILL.

The testator after appointing executors and trustees, and directing the payment of his debts and funeral expenses, gave, devised and bequeathed *"all his estate, real, personal or mixed and wheresoever situate"* in trust nevertheless for the uses and purposes hereinafter set forth, that is to say:—

1. "To pay the *rents* income issues and profits arising from and out of my said estate to my wife Mary Ellen Gay for the term of her natural life, and to be applied by her for the support of herself and the support maintenance and education of my children born of the body of my said wife Mary Ellen."

2. "And from and after the death of my said wife I direct my said Trustees Herman Focke or his successor in said trust to pay the *rents,* income, issues, and profits arising from and out of said Trust estate as follows: one half thereof for the support and maintenance of my sons Llewellyn Napela Gay, Reginald Eric Gay and Arthur Francis Gay share and share alike; and as to the other part thereof to pay the same for the support maintenance and education of my daughters Alice Mary K. Gay, Ethel Pauline N. Gay, Helen Fanny Gay, and Frida Gay, share and share alike."

3. "And from and after the death of all my children born of the body of my said wife Mary Ellen I direct my said Trustee or his successor to convey one half of *said trust estate and all additions or increases thereto,* unto the children of my sons (naming them as before) share and share alike and the child or children of any deceased child to take the parent's share. And as to the remaining portion of *said Trust estate and all additions or increase thereof,* I direct my said Trustee or

his successor in said Trust to convey the same unto the children of my said daughters (naming them as before) share and share alike, and the child or children of any deceased child to take the parent's share."

Then followed a direction that the Testator's trustees should pay the share of the income belonging to any deceased child to the heirs that might survive such child who should die.

Then follows a power of appointing new trustees; and the Will continues:

4. "*It is my wish and I hereby direct* that my said Trustees or their successors or successor, shall manage, conduct and carry on the business of ranching and stock raising at Mokuleia on the Island of Oahu, so long as it can be done so, profitably, and without loss;

5. "And I hereby EMPOWER them or their successors or successor at any time when in their discretion they think that a sale of all the property at said Mokuleia, would by a reinvestment of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this Will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this Will."

It will be seen that the trusts expressed in the paragraphs numbered above 1, 2, and 3, were to pay the "*rents,* income, issues and profits" of the trust estate to testator's wife for life; on her death to pay the "*rents,* income, issues and profits" to his children for life, and on the death of the last survivor of them to convey "*the said trust estate and all additions or increase thereof*" to his grandchildren.

The Trustees in the conduct of the ranch used the rents accruing from the leases, the widow and family receiving the net profits, and after 1906 paid the net *rents*, including income derived from subleasing to the life tenants, on their understanding that this was what was meant by the testator when he disposed of the "rents, income, issues and profits" of the trust estate.

The question was raised by present counsel for the trustees as to whether under the terms of the will their procedure in the past of paying all of the net *rents* to the life-tenants was justified in view of the clause in the will directing the conveyance of the "trust estate with all additions or increase thereto" to the grandchildren on the death of the life tenants, and the fact that if the trustees continued to hold the Mokuleia lease and pay all the income therefrom to the life tenants the lease would become exhausted (as had already occurred in the case of the Ookala lease) and nothing be left for the remaindermen.

RULE IN HOWE VS. DARTMOUTH.

The above question presented itself to counsel in consequence of a long established rule of construction in the English courts of chancery, adhered to in the case of Howe vs. The Earl of Dartmouth in the year 1802 (7 Ves. 137) and known ever since by the name of that case.

The case was decided in 1802. The terms of the will were very simple and concise. The testator left *all his personal and landed estates* to his sister for life, and then over. The will contained no indication whatever

of the intention of the testator as to how or in what manner the estate was to be enjoyed. It was a simple case of a gift to one for life, with remainder over. No discretionary power was vested in the trustees to retain any of the investments in the state in which they existed at the death of the testator, and there was no language in the will indicating any intention of the testator that they should so remain.

The rule, with its qualifications, has been expressed in numerous cases as follows:

> "I take it to be the rule of the court that when a testator has given an estate or the residue of an estate to persons in succession, as to one for life with remainder to another person, the court, presuming that the testator intended that the remainderman should have something, will so deal with the property, if it be a property that is wearing out and may terminate during the life estate, as to secure the accomplishment of that intention and give the remainderman something * * * * for that purpose it will convert the personalty into a permanent investment. That is the rule; and the court only acts upon the *general intention* of the testator that something should be given to the person who is the donee in remainder *But* if upon construction of the will it appears that the testator had *another intention,* that is to say, an intention to give one or more persons who are to take for lives, or during a succession of lives, the enjoyment of the property in the state he left it at the time of his death, then the court will carry that intention into effect, and every case which can arise will turn upon this question of construction, whether you

intention is to be found in the will, *and considering it quite as well settled* as Howe vs. Dartmouth itself is, that when you find an indication of intention that the property is to be enjoyed in its existting state, it shall be so enjoyed, I think that justice could not be done if the principal of Howe vs. Dartmouth were applied to the circumstances of such a case".

Pickering vs. Pickering, 4 Myl. & C. 289.

PROPOSITIONS PRECLUDING APPLICATION OF RULE

In the case at bar the testator devised and bequeathed to his trustees "all his estate, real personal or mixed, and wheresoever situate" upon trust to pay the "rents, etc." to his wife for life; from and after her death to pay the "rents, etc." for the support and maintenance of his sons and for the support, maintenance and education of his daughters; and upon the death of the last survivor of his children to convey the "trust estate with all additions and increase thereto" to his grandchildren.

The will in the case at bar contains NO TRUST FOR CONVERSION.

The trustees were DIRECTED to continue the testator's ranch business and the will gave them a DISCRETIONARY POWER OF SALE. There was no mention of the leaseholds in the earlier clauses of the will, but distinct reference was made thereto in the clauses directing the conduct of the business at Mokuleia and authorizing a sale of *all the property* at Mokuleia.

Premising that the applicability of the Howe v. Dartmouth rule in any case depends upon the particular

circumstances of the case, and the weight to be given to the expressions contained in the will, it is submitted that the authorities examined (which include:—Halsbury on the Laws of England, Vol. 14 p. 283 et seq, Vol. 28 p. 31, 32, 129 and cases cited in notes; 3 Pomeroy's Equity Jurisp. 14th Ed. Sec. 1168 et seq. and cases cited in notes; White & Tudor's Leading Cases in Equity; Lewin on Trusts, pp. 297 et seq; Perry on Trusts, Secs. 448 et seq; 1 Jarman on Wills (6th Ed) pp. 604 et seq, and practically all of the English decisions on the question referred to in the various cases and text books) fully sustain the following propositions excluding the application of the rule to the will of this testator:—

(A). Absention from conversion is required where in a will there are specific directions as to the disposition of the income of the property devised or bequeathed and, while the use of the word "rents" does not rebut the presumption of conversion in a case where an estate consists of *both leasehold and freehold,* where there is *no freehold* the use of the word "rents" is a strong indication that leaseholds are to be enjoyed in specie and the life tenant is entitled to the actual rents produced by them.

Bowden vs. Bowden, 17 Sim. 64.

In this case the testator gave all his leasehold estates and all other his estate and effects to trustees for the benefit of his wife, his daughters, and the children of the latter, in succession; and, in declaring the trusts

he used the terms "rents, issues, dividends and annual proceeds; he *empowered* the trustee to sell his leasehold estates and to invest the proceeds on mortgage of freehold or other leasehold estates and to lease any part or parts of the said estates. Counsel for the widow insisted that the leaseholds be sold and argued that the will clearly showed that the testator meant his leasehold estate, which was the principal part of the trust property to be so dealt with that his grandchildren might have the benefit of it. The respondents relied on the frequent use of the word "rents" and on the *power of sale* in the will, as showing that the testator had not made *obligatory* upon his trustees to convert the leaseholds into money. The Vice-Chancellor held that the leaseholds were not to be sold.

Burton vs. Mount 2 De G. & Sm. 383.

In this case the testator gave all his "estates and effects, both real and personal" upon trust to pay the rents, issues, profits, dividends and interest thereof to A for life, with remainder over, and *empowered* his trustees at any time or times, or from time to time, *at their discretion,* to make sale and dispose of the freehold and leasehold estates or any of them. The Vice-Chancellor held against conversion of the leaseholds, stating:—

> "Upon the weight of authority, and upon my own opinion independently of authority, I think the tenant for life right in his contention as to the leasehold property—that it should not be sold."

See also:

Hinves vs. Hinves, 3 Hare, 609.

Vachell vs. Roberts, 32 Beav. 140, 142.

In the latter case the testator devised and bequeathed "all his real and personal estate whatsoever and wheresoever" on trust to permit A. to receive and take the rents, issues and profits for life, with remainder over as to the said real and personal estate. It was held that the word "rents" would refer to and include both the leasehold and freehold.

See also:—

Crowe vs. Crisford 17 Beav. 507, to the same effect. Both of the last named cases, in which the estates consisted of both freehold and leasehold, have been disapproved in the case of *Re Wareham.* (1912) 2 *Ch. Div.* 312. In this case the language of the court was as follows:—

> "I agree with Kindersley V. C., (Craig vs. Wheeler, 29 L.J. (Ch) 374) that where a testator has *both freehold and leaseholds,* the *mere use* of the word "rents" is not an indication of intention that the property is to be enjoyed in specie, inasmuch as the use of that word can be satisfied by applying it to the freeholds. The testator had real and leasehold property, and the reference to "rents, issues and profits" is not sufficient indication to outweigh the general rule that the tenant for life is not to receive the whole of the rents of the leasehold property, *seeing that there is real estate* to which the words "rents" may be referred".

See also: *Re Game* (1897) 1 Ch. Div. 881, cited in above case.

In this case it was held that as the residuary estate included *both freehold and leasehold property,* neither

the use of the word "rent" nor the power of distress given in the will were sufficient to take the case out of the Howe vs. Dartmouth rule "as the use of the word "rents" and the power of distress would be satisfied by applying them to the freeholds".

Goodenough vs. Tremamando, 2 Beav. 512.

In this case the testator gave the residue of his estate and effects to trustees upon trust to permit "the rents, issues and profits thereof" to be received by his son for and during the term of his natural life and after the latter's decease to the testator's granddaughters when they attained the age of twenty-one, with power after the death of the son to apply the "rents, etc." towards the maintenance and education of the granddaughters until their shares should become vested. It appears from the decision that the will was not executed so as to pass *real estate,* and a part of the testator's property consisted of a leasehold. It was urged that if no conversion took place there would be little chance to those in remainder of receiving any benefit from the leasehold property. The Master of the Rolls said that he could not declare this to be a paper conversion "without striking out the word 'rents' which was twice repeated in the will," as it appeared that *there was no other property except the leasehold to which the term "rents" was applicable.*

See also Pickering vs. Pickering, 4 Myl. & Co. 289. The last case is generally cited as a leading authority for the proposition above advanced.

Blann v. Bell, 2 De Gex, M. & G. 775;

Cafe vs. Bent, 5 Hare, 24;

In this case the Vice-Chancellor said:—

"I think the cases of Pickering v. Pickering and Goodenough v. Tremamando are the authorities for putting a more precise construction on the word "rents", and for holding that this will carries intrinsic evidence that the testator contemplated the enjoyment in specie of the leasehold in question."

The case of Pickup v. Atkinson, (1846) 4 Hare 624 is the only case that counsel for the trustees has been able to find in which, there being no freehold, a court has held that the lease should be converted. After a specific bequest of certain leasehold houses, to the testator's wife for her life, with remainder over to his nephew, the testator bequeathed "the rents, profits, dividends and interest" of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons. It was held that the widow was not entitled to the enjoyment in specie during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. The court in its decision speaks as follows:—

"Admitting that the word "rents" as it occurred in the will may be *material in connection with other circumstances,* the question first to be considered is whether that word *alone* is in this case sufficient evidence of the intention which the tenant for life ascribes to the testator. My opinion is against such a conclusion . . The conclusions (reached by the court) appears to me to be put beyond dispute when it is considered that the words "rents, etc." in this case mean "rents, etc", not

of the property then had, but of such property, real, personal and mixed, as he might happen to have at the time of his death. The same conclusion arises from the words of the gift over, namely: "the whole of such residue of such property" * * * * . In Pickering vs. Pickering the word "rents" occurred but it does not appear to me that the word was relied upon as alone constituting a ground for preserving the property in specie. There are other and very elaborate reasons given for that conclusion. In Goodenough vs. Tremamando the word "rents" occurred twice, and Lord Langdale appears to have thought that the use of it the second time was conclusive evidence that the testator treated his property as unconverted when the estate in remainder fell into possession, and therefore that the legacy was specific in the direct sense of that term. *And he says further that there was no other property* belonging to the testator, *except the leaseholds,* to which the terms "rents" was applicable, which shows that he considered the bequest as specific in the strict sense of the term. * * * * * * * * *In this case* any property, freehold or leasehold to which the testator *might have been entitled at his death* would satisfy the gift; and that in my opinion shows that *the testator could not have had any particular object in his mind to whic hthe direction was applicable,* but that he referred to the income of his property generally".

In the case at bar there is intrinsic evidence that the testator had particular objects in mind for he referred particularly to his business and property at Mokuleia—all leasehold property. There is the further fact to be borne in mind that as the will was executed three days before his death he was disposing of the property

which he actually had and that he was not thinking of freeholds which he might subsequently acquire and have at the time of his death.

Hood vs. Clapham, 19 Beav. 90.

In this case the testator had both freehold and leasehold property. By his will he gave "all his freehold, copyhold and leasehold estate and all other his real and personal estate" to trustees upon trust to get in all money due to him on "mortgages, bonds or other securities and rents" and after payment of debts and legacies to lay out the residue in the public stocks or funds; and as to one-half of his freehold, copyhold and leasehold estates, and all the trust moneys, stocks, etc., and all other his real and personal estate upon trust to pay the "rents, dividends and annual income to A for life, and he declared that after the decease of A, the INHERITANCE AND CAPITAL of such half part should be held in trust for her children. There was a similar trust as to the other half. It was held that annuities, furniture, etc., forming part of the testator's estate should be converted, but that (semble, from the use of the word "rents") *the leaseholds were to be enjoyed in specie,* the court saying that the leaseholds were expressly given to the tenants for life for their lives.

There are two cases: Chambers v. Chambers, 15 Sim. 183; and Morgan v. Morgan, 14 Beav. 72, which are sometimes cited in opposition to the rule that where there are only leaseholds the use of the word "rents" does not indicate that the leaseholds are to be enjoyed

in specie, but it is to be noted that in each of them *in the language of the trust* the word "rents" was confined to the freeholds. In each case there was a separate devise of the testator's real estate to trustees on trust "to pay and apply the rents" for the benefit of a person, with remainder over; there then was a separate bequest of the residue of the estate to trustees with directions to apply "the whole of the income" thereof to such person, with remainder over of all the "said residuary estate and effects". In Morgan v. Morgan it was held that the tenant for life was not entitled to the enjoyment of the leaseholds in specie, there not being sufficient to indicate that a conversion should not take place—"the word *"rents is used but it is confined to the freeholds."* The court says:—

> "There is certainly a great variety of cases, where the court has laid hold of various small expressions as indicating the testator's intention that the property was to be enjoyed in specie, but all or nearly all of them I think referable to a particular mode of management of the property for payment out of it which management or payment could not take place unless the property remained unconverted. * * * There are other cases where the *testator has expressly referred to the property by name as unconverted*, or has described his property *as remaining in the manner in which it was situated when he died.* These cases have no reference to the present, *as the will contains no such expression."*

The case of Mills v. Mills (1835) 7 Sim. 501 is cited by the life tenants for other purposes. In this case,

which, so far as counsel for the trustees can learn, stands alone, the testator gave all his freehold and leasehold messuage lands and hereditaments and all other his real and personal estate in trust "to pay the *rents* of his *freehold* and *leasehold* estates" and the dividends, interest and proceeds of his money and other his personal estate to his daughter for life, and after her death in trust "out of the *rents* and profits of his said *freehold* and *leasehold* estates" and the dividends, etc., to pay an annuity to her husband, and subject thereto to stand possessed of his said freehold and leasehold estate, moneys, etc., for the children of his daughter, and in default of such children to the Corporation of S. in trust "to sell his *freehold* and *leasehold* estates", and sell, collect and call in his personal property, and lend the proceeds to certain persons upon the terms mentioned in the will.

In a suit brought on behalf of the grandchildren *it was held that the leaseholds should be converted.* The reason given for the decision was that no portion of the personal estate was given *specifically,* a distinction which the authorities show has long become obsolete. Certainly it would appear that by the extension of the rule in Howe vs. Dartmouth to this case the expressed intention of the testator was defeated.

For other cases in support of the general proposition advanced above, see

Collins vs. Collins, 2 Myl. & K. 702,

Skirving vs. Williams, 24 Beav. 270.

(B) Where there is no trust for conversion, an express power to retain existing investments is sufficient to exclude the application of the rule in Howe vs. Dartmouth, and a tenant for life has the right to enjoy the actual income from the investments.

Gray vs. Siggers, 15 Ch. Div. 74.

In this case a testator gave his real estate and all the residue of his personal estate, including several leasehold houses held upon short terms, to trustees upon trust to pay and apply the annual income to his wife for life, remainder over to his grandchildren. He *empowered* his trustees to retain all or any portion of the trust estate in the same state in which it should be at his decease, or to sell and convert the same at such time, etc., as the trustees should in their discretion think fit. It was held that the special power to retain existing investments took the case out of the general rule as to conversion of personal property. The language of the decision (Malins, V. C.) was in part as follows:—

> "If this question had rested only *upon the first part of the will* in which the testator gives his estate in trust to pay the annual income to his wife for life, and after his death to divide it between the grandchildren, then it is perfectly clear that all perishable property such as leaseholds must have been converted for the benefit of all parties interested, so that the wife would have had the life income and the capital would have been preserved for the grandchildren. That would have come strictly within Howe vs. Dartmouth and also Mc-

Donald vs. Irvine (1878) (8 Ch. Div. 101), where there was NO DISCRETION, NO POWER, NO RESTRAINT. But the testator having given all his property to his wife for life, without adding any words to show that the property was to be held in the state in which it had drifted at his death, adds this very precise declaration:—(quoting power of trustees to retain property) so that they have the most absolute power of selling, if they think fit, and of retaining, if they think fit; retaining for the purpose of enabling the wife to have the same income, and the same enjoyment from it that the testator himself had. Therefore, *the case is entirely taken out of Howe vs. Dartmouth,* and *McDonald vs. Irvine,* because of this power which gives the trustees the right to retain the property in specie. * * * *

I cannot look at the question whether the leaseholds are for long or short terms, because whether long or short the widow is to have the property in specie if the trustees thought fit to retain it. THEN LOOK AT THE PROBABILITIES. This testator was a small tradesman. He was of miserly habits and made his money chiefly by discounting bills. His property consisted of Spanish and Mexican bonds and a considerable amount of leasehold property. *If the leaseholds were sold, his wife, instead, perhaps, of getting £100 a year, might not have more than £20 a year. I thing he intended, if the trustees saw fit, that she should enjoy the property in specie just as he was enjoying it".*
Counsel then remarked that he thought the Vice-

Chancellor would be glad to learn that his predecessor had decided in the same way the case of Simpson vs. Lester, 4 Jur. N. S. under a like power in the same way.

In re Bates, (1907) 1 Ch. Div. 22.

In this case the court said:

> "The discretionary power to retain the investments for a time is inconsistent with an obligation to convert, for if they have the right to retain for such period as they think fit, they may retain for five years, or indeed may never convert at all; and if so, they are only exercising the discretion given them by the will. If they do that they cannot convert, and more than that, the testator by giving this discretion, has stated in plain and clear language, that they are not bound to convert. If they retain they exclude the operation of the rule."

In re Nicholson, (1909) 2 Ch. Div. 111.

In the above case the testator by his will appointed three trustees and gave them all his real and personal estate not otherwise disposed of. He directed certain legacies to be paid and the will then proceeded as follows:—

> "I direct that all the rest and residue of my real and personal estate and the property so given to my trustees as aforesaid upon trust (*hereinafter called my residuary estate* and property) shall be *invested* by my trustees and I desire them to pay over the interest, dividend and income thereof to my said wife during her life."

He also directed that after his wife's death *"such*

residuary estate" should be distributed among different persons. He then towards the end of his will gave his trustees the following power:—

> "I authorize and empower my trustees at their discretion to sell and convey all or any part of the said real estate and to collect and get in all or any part of my personal estate or to permit it to remain on investments the same as those in which it may be invested at the time of my death".

The syllabus of the case is as follows:—

> (1) Where a will contains *no* trust for conversion and the tenant for life of the residue is given the entire income thereof, he is entitled to the income of the unauthorized securities retained by the trustees under a power of retainer whether the securities are of a permanent or *wasting* nature.
>
> (2) There is no distinction for the purposes of the application of the rule in Howe vs. Dartmouth between unauthorized securities of a wasting and those of a *hazardous* nature.

At the time of the testator's death, his estate was invested in a number of securities which included many which were unauthorized as trustees' investments.

One of the investments was in shares of a limited company unauthorized for trustees' investment and the court said:—

> "For the purposes of what I am about to say, I think it is better for me to assume that it is a wasting security, it being admitted that so far as the unauthorized securities generally are concerned,

the tenant for life is entitled to the actual income arising from them.

"The contention of the remainderman is that the true effect of what we lawyers call the rule in Howe vs. The Earl of Dartmouth, (7 Ves. 137) is that you must *presume* that, if a testator gives in general terms personal estate to be enjoyed by several persons in succession, he means what he says, and that, if part of the personal estate consists of items of property which are of a wearing out nature, the only way in which the testator's intention that they should enjoy the estate in succession can be carried out is by converting the whole estate or by treating it as converted into an authorized form of investment, and then paying the tenant for life the income of the authorized investments representing the estate when so converted. *The rule only means* that the court will *assume* that by the gift of the personal estate to several persons in succession the testator intended that the whole of his estate should be converted, that being the only means by which in the case of wasting property the several persons would be enabled to enjoy it in succession. *What the court has to see is whether on the will with which it has to deal it is to say that the conversion to which I have alluded is to take place.*

In the present case the will contains *no trust for conversion.*

The estate itself is given to trustees upon trust to invest and pay the income of the investments to the tenant for life. The trust to invest there, having regard to what comes afterwards in the will, must mean to invest such *moneys* as the trustees

might properly have in their hands, arising either from the collection or falling in of the personal estate, or the conversion of investments which under the power subsequently given they may convert. *It cannot mean* to convert the whole of the estate in whatever condition it might be at the testator's death. The powers given by the will are absolute, discretionary and alternative to convert the estate or to permit it to remain in the same state of investment as at the testator's death. If, therefore, the *testator has said* that his trustee may retain any part of his estate in the same state of investment as at the time of his death, and if an investment at his death consisted of what is called a wasting security, *how can I say* that, as between tenant for life and remainderman, he intended that a particular investment should be converted into money? *He* has said that it may be retained, or in other words that in the case of wasting securities, if retained by his trustees in the proper exercise of their discretion, *the persons entitled in remainder are to take their chance of the tenant for life dying during the continuance of the security*".

The court then cited with approval *Gray vs. Siggers,* (1872) 15 *Ch. Div.* 74, and *In re Bates,* (1907) 1 Ch. Div. 22, and declined to follow *Porter vs. Badderly,* (1877) 5 Ch. Div. 42, and held that there was no distinction to be made between *hazardous* and *wasting* securities, the distinction which had been made in Porter v. Badderly.

(C) If there be no trust for conversion, and the instrument creating the trust expressly gives to the

trustee a discretionary power of sale—a discretion as to conversion or non-conversion—he may exercise it by refraining from conversion in *spite of one cestui que trust, being thereby benefited at the expense of another.* With such an exercise of discretion a court of equity does not interfere, and until conversion the tenant for life has the right to receive the actual income.

> "If a testator negatives a sale at the time of his death by authorizing or directing conversion at a subsequent period, or if he uses any other expressions which assume leaseholds or stock to be unconverted when by the general rule it would be converted, the doctrine of conversion is excluded".
>
> Lewin on Trusts, page 299.
>
> Re Sewell's Estate, L. R. 11 Eq. 80.
>
> Thursby vs. Thursby, 19 Eq. 395 (reviewing a large number of authorities.
>
> Gray vs. Siggers, (supra)
>
> Re Pitcairn (1896) 2 Ch. Div. 199.

In the case last cited the language of the court is in part as follows:—

> "The testator has the right to say what is to be done, and his intention as expressed in or to be deduced from the terms of his will must be carried out. *But if he has given no direction on the subject, the court applies its own rule.* * * * * * * * In my opinion the power given to the trustee to sell and dispose of the estate "if and when they shall consider it expedient" means that they are to have the power of selling and disposing of it *if* they think it expedient and when they consider it

expedient, and if they have power to do this they necessarily have power not to do it. If they have the power to sell if and when they think fit, then they necessarily have power not to sell unless they think fit, and that in my opinion amounts to an express power to the trustees to convert or not, as they think fit. * * * It seems to me that several authorities show that, when a testator has directed that the conversion of his estate shall take place at some time other than that at which the rule of the court (Howe vs. Dartmouth) would make conversion necessary, *the rule of the court has no application* * * * * when it is left to the discretion of someone else to say when the sale is to take place, *the testator himself having provided for the sale,* there is no rule of the court which requires that the sale to be made in a different way or under different circumstances."

Sherry vs. Sherry, (1913) 2 Ch. Div. 508.

Green vs. Britten, 1 De G. J. & S. 649.

Brown vs. Gellatly, L. R. 2 Ch. App. 751.

Re Leonard, Theobald vs. King (1880) 29 W. R. 234, cited in note to same effect in Vol. 28, Halsbury, Laws of England, pages 31 and 129.

Where, however, there is a trust for conversion, with a power of postponement, it seems that the life tenant is not entitled to the actual income pending conversion.

In re Chaytor, (1905) 1 Ch. Div. 233.

Yates vs. Yates, (1860) 28 Beav. 637.

(D) According to the modern doctrine the question of the application of the rule does not depend on the legacy or bequest being specific or not.

1 Jarman on Wills (6th Ed.) page 607.

Alcock vs. Sloper, 2 Myl. & K. 699.

In the latter case it is stated by the court that:—

"In the case of Howe vs. Dartmouth some confusion arises from the use of the term "specific legacy" in the judgment, general personal estate being at all times fluctuating; until the death of a testator there can be no specific legacy of general personal estate".

Pickering vs. Pickering, 2 Beav. 58; 4 Myl. & Cr. 289.

In this case the court says:—

"There is an obscurity which frequently arises in these cases, from the use that is made of the term "specific legacy"; when the word "specific" is used on such an occasion as this, I do not think it is used in the ordinary sense in which "specific" is applied to a legacy. It is used to this extent only, that the property is to be specifically enjoyed.

McDonald vs. Irvine, 8 Ch. Div. 101.

Hinves vs. Hinves, 3 Hare 609.

Hubbard vs. Young, 10 Beav. 203.

(E) Where a trustee is given mere authority to convert in his discretion, without the *imperative duty* of doing so, there is no equitable conversion.

1 Perry on Trusts, Sec. 448 and cases cited in Note 1.

3 Pomeroy Eq. Jurisp., Secs. 1159 et seq.

Cases in which rule Howe vs. Dartmouth has been applied:

The cases, most frequently cited in the authorities, in which conversation of leaseholds and other personalty has been ordered are as follows:—

Litchfield vs. Baker, 13 Beav. 446;
Chambers vs. Chambers, 15 Sim. 183;
Morgan vs. Morgan, 14 Beav. 72;
McDonald vs. Irvine, 8 Ch. Div. 101;
Dimes vs. Scott, 4 Russ. 195;
Benn vs. Dixon, 10 Sim. 636;
Mayer vs. Simonsen, 5 De G. & Sm. 723;
In re Game, 1 Ch. Div. 881;
Pickup vs. Atkinson, 4 Hare 624;
Wareham vs. Brewin, 2 Ch. Div. 312;
Mills vs. Mills, 7 Sim. 501;
Thornton vs. Ellis, 15 Beav. 193.
Blann vs. Bell, 2 De G. M. & G. 775.

Most of these have been referred to herein; all of them, together with numerous others, have been examined carefully, and counsel for trustees has found in them nothing in opposition to the proposition advanced by him in this brief. In *Dimes vs. Scott,* the language of the will was imperative; the executors were expressly directed to convert the personal estate,

nothing was left to their discretion, and it was held that having neglected to convert it, the trustees were liable and the property was to be considered as if it had been duly converted. In *Benn vs. Dixon* and *Litchfield vs. Baker* the terms of the wills were simple and concise, there being in each case (as in Howe vs. Dartmouth) a gift to one with remainder over. The same is true of *Thornton vs. Ellis,* and in none of the cases are there to be found a power of retaining investments or a discretionary power of sale, while in some at least there are express trusts for conversion. *Meyer vs. Simonsen* was also a case like Howe vs. Dartmouth and in conformity with the rule of that case it was held that the personalty should be converted; the rules therefore announced in that case have no application to a case in which the Howe vs. Dartmouth rule does not apply, and where conversion is neither implied nor expressly directed. In none of the cases could the courts find any expressions indicating that the personalty was to be enjoyed by the first taker in specie.

In conclusion counsel for trustees, after a careful examination of the English authorities, respectfully submits that, in view of the circumstances surrounding the testator at the date of his will and of his death, the condition of his estate, the relation in which he stood to the beneficiaries under his will, the use of the word "rents" in the will, the authority to carry on his

business and the discretionary power of sale contained therein, no conversion of the personalty was required or intended by the testator and that the life tenants were and are entitled to the payments of the rents made to them by the trustees.

Dated: Honolulu, T. H., May 15th, 1923.

Respectfully submitted,

W. L. STANLEY,

.....

Counsel for H. Focke and H. M. Von Holt, Trustees under Will and of the Estate of James Gay, deceased. Appellees.

Service of the foregoing brief and receipt of a copy thereof is hereby admitted this..... day of May, 1923.

.....

Counsel and guardian ad litem for Appellants.

.....

.....

Counsel for Life-tenants—Appellees.